Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1411

# In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT BLAKE MCCALLUM, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the district court abused its discretion by excluding certain evidence at trial.

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on 27 counts of making false statements, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of five years' imprisonment on Counts 1 through 26, and to five years' probation and a $10,000 fine on Count 27. The court of appeals affirmed (Pet. App. A1-A8).

1. The evidence at trial showed that on May 4, 1982, Norman Murnan, the vice president of Allied Fidelity Insurance Company, gave petitioner, a bail bondsman, 462 powers of attorney and empowered him to post bonds on the company's behalf. Two days later Murnan revoked that authority in writing. On the same day, William Nichols,

Allied's regional manager, told petitioner of the termination and requested that all the powers of attorney be returned. Nichols also informed the Dallas County Sheriff's office that petitioner was not authorized to act on behalf of Allied. On May 19, Allied's counsel wrote petitioner, again demanding that he return all the powers of attorney (Pet. App. A2).

From June 1 through August 27, 1982, petitioner signed and presented to the United States District Court for the Northern District of Texas 27 bonds with attached powers of attorney from Allied to secure the appearance of persons charged with immigration law violations (Pet. App. A2). These filings, in which petitioner represented that he was authorized to act for Allied, formed the basis for the charges against him.

In his defense, petitioner contended that he relied on the advice of his attorney, Randy Taylor. Taylor reviewed the agreement between Allied and petitioner and advised petitioner on May 7, 1982, that only Allied's president, not its vice president, could revoke a power of attorney. Accordingly, Taylor advised petitioner that he could continue writing bonds until Allied's president issued a written revocation (Pet. App. A2-A3).

2. The court of appeals affirmed, rejecting petitioner's contention that the trial court had improperly excluded certain defense evidence. Petitioner argued that he should have been allowed to offer Allied's bylaws that were in effect from 1972 through 1981, even though petitioner's offenses occurred in 1982. According to petitioner, the earlier bylaws showed that a vice president could have appointed and terminated an agent, but that after 1981 such action could be taken by a vice president only if it was authorized by both

the board of directors and the president.[1] Thus, petitioner contended, he was never properly terminated and his conduct did not amount to wilful fraud. The court of appeals agreed with the district court's ruling that the prior bylaws were irrelevant. In the court of appeals' view, "[i]nformation not known by [petitioner], or even his attorney, could not affect his lack of willfulness defense" (Pet. App. A6).

The court also rejected petitioner's contention that the district court abused its discretion in prohibiting petitioner from recalling his attorney to testify about advice he gave to petitioner after May 7, 1982. The court concluded that that testimony was both cumulative and irrelevant, since Taylor had already testified about his initial advice and there was no evidence suggesting that the attorney's advice had changed or that there had been any change in petitioner's state of mind after May 7 (Pet. App. A5).

Similarly, the court of appeals found no abuse of discretion in the district court's exclusion of evidence that the Immigration and Naturalization Service (INS) had filed suit against Allied to collect on several forfeited bonds signed by petitioner. Petitioner argued that that evidence was relevant to impeach the testimony of Allied's officers by demonstrating bias on their part. Both courts below, however, agreed that, under Fed. R. Evid. 403, any probative value of that evidence was far outweighed by the likelihood that the evidence would confuse the jury (Pet. App. A4).

3. In this Court, petitioner renews his claim that the trial court abused its discretion by excluding: (1) evidence of the pending litigation between INS and Allied; (2) evidence of

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[1]Allied's president, Harold Croquart, testified that he had delegated to the vice president the power to grant and terminate bail bonding authority and that he interpreted the bylaws as giving him the power to delegate that authority (Pet. App. A3).

out-of-date Allied bylaws; and (3) testimony that his attorney continued to advise him after May 7, 1982, that Allied's purported termination was unlawful.

a. The exclusion of testimony about a civil suit between INS and Allied was not erroneous. Thomas Burton, Assistant Regional Counsel for INS, testified outside the presence of the jury that INS had filed suit against Allied for payment on the forfeited bonds written by petitioner. In Burton's view, Allied was liable for the bonds because it had not notified INS that petitioner was no longer an authorized agent of Allied. The issue in the civil suit, therefore, was petitioner's *apparent* authority to act on Allied's behalf. That issue was quite different from the question of petitioner's *actual* authority to act for Allied, which was at issue in the criminal trial. According to Burton, "whether [petitioner was] a qualified agent or not, in regards to Allied or the Government at that time, [INS] treat[s] him as qualified until [they] are notified otherwise" (Tr. 326). In these circumstances, the district court correctly found that evidence of the civil litigation was irrelevant and confusing, and that it did not demonstrate any bias on the part of the witnesses still employed by Allied (Tr. 332-333).

The evidence regarding the INS civil suit against Allied would have had little probative force for other reasons as well. Norman Murnan, the former vice-president of Allied and the principal government witness at trial, was no longer employed by Allied at the time of the trial (Tr. 51-52). He therefore would not have been affected at all by any litigation against Allied. Moreover, petitioner did not challenge the testimony of the three Allied representatives who said they had contacted petitioner to advise him that his relationship with Allied was terminated. Instead, his defense was that in spite of those contacts, he was still legally entitled to represent Allied, and that his attorney had so advised him. Because petitioner's defense did not turn on

attacking the credibility of the Allied witnesses, the evidence regarding the civil lawsuit would have been of no real help to petitioner at trial.

This Court's decision in *Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986), on which petitioner relies, provides no support for him. In *Van Arsdall*, this Court made clear that not all errors—even constitutional errors—require automatic reversal of a judgment of conviction. See *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983). Rather, such errors must be weighed under the harmless error standard. In this case, because the district court did not err at all, the harmless error analysis in *Van Arsdall* is inapplicable.[2]

b. Petitioner next argues (Pet. 7-8) that the district court abused its discretion by refusing to admit Allied's bylaws that were in effect from 1972 through 1981.[3] The court of appeals correctly held that the obsolete bylaws were irrelevant (Pet. App. A6).

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[2]Contrary to petitioner's contention (Pet. 7), the decision below does not conflict with decisions of the District of Columbia Circuit. In *Villaroman* v. *United States*, 184 F.2d 261 (D.C. Cir. 1950), the complaining witness had instituted a civil suit against the defendant arising out of the same circumstances as the crime. See also, *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981). The potential for bias in that setting was obvious: the witness stood to benefit personally from a judgment against the defendant in the criminal case. The present case is far different: petitioner is not a party in the civil case, nor, for that matter, are the witnesses parties in the civil case, and there was no showing that the witnesses would be affected by the outcome in either proceeding.

[3]The district court admitted Allied's bylaws that were in effect from May through August 1982, the times pertinent to the indictment. Petitioner proffered bylaws in effect from 1972 through 1981 to show that while earlier bylaws permitted the vice president to terminate attorneys-in-fact, those in effect at the time of the indictment permitted only the president to do so. He also proffered the testimony of a corporate law

As the court noted, petitioner's defense was that, despite his notice of termination, he believed that he still had the authority to write the bonds because his attorney had advised him that he was not lawfully terminated. Thus, according to petitioner, he did not wilfully make a false statement. But petitioner was unaware of the prior bylaws, and petitioner's attorney did not rely on the earlier bylaws in formulating his advice (see Tr. 373 *et seq.*). Hence, as the court below found (Pet. App. A6), those outdated bylaws were irrelevant, because "[t]hat which was not known could not be relevant to [petitioner's] state of mind."

c. Petitioner finally contends (Pet. 9) that the district court erroneously refused to allow him to recall his attorney to testify about the advice he gave to petitioner after May 7, 1982. The trial court correctly found, however, that that testimony would have been unnecessarily cumulative.[4] As the court of appeals noted (Pet. App. A5), the evidence did not suggest that petitioner's state of mind had changed

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expert who would have testified that under the bylaws, the vice president had no authority to terminate petitioner. The district court excluded petitioner's proffered testimony as irrelevant because it was "undisputed * * * in the testimony that [petitioner] was unequivocably advised prior to the time he executed [the] bond * * * that he was terminated. So he knew he was terminated. And it doesn't make any difference if the bylaws said, pie in the sky * * * the fact is that they terminated him to his face. Whether it was good as to the Immigration and Naturalization Service is something else. But as between Allied Fidelity and the [petitioner], he was terminated, and he knew he was terminated" (Tr. 338).

[4]At trial, petitioner contended that throughout the relevant period he continued to rely on the opinion of his attorney, who had advised him on May 7, 1982, that he had not been lawfully terminated and could continue issuing bonds. After the attorney completed his testimony, petitioner attempted to recall him to testify that his advice had remained the same throughout the several month period covered by the indictment. The trial court concluded that that proffered testimony was cumulative of what the attorney had already stated (Tr. 416-420).

between May 7, 1982, and August 27, 1982. Hence, there was no need for petitioner to show that the attorney's advice remained consistent during the period between May and August of 1982.

The jury was properly instructed that if petitioner had acted in good faith reliance on the advice of an attorney to whom he had made full disclosure, he could not be convicted (see Pet. App. A3-A4). Under that instruction, the verdict shows that the jury concluded that petitioner did not rely in good faith on his attorney's advice. The evidence that his attorney had not changed his legal advice to petitioner during the months after May 1982 could not have affected the jury's conclusion on that issue.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

MAY 1986

DOJ-1986-05